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LABOUR AND EMPLOYMENT COMMUNIQUÉ

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HUMAN RIGHTS TRIBUNAL CLARIFIES EMPLOYERS' RELIGIOUS HOLIDAY OBLIGATIONS

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The case of *Markovic and Autocom Manufacturing Ltd.*¹ considers employers' obligations with respect to religious holidays falling on days that are otherwise regular workdays. Autocom, the employer, refused to pay Mr. Markovic when he took off January 7, 2004 to celebrate Eastern Orthodox Christmas. Mr. Markovic complained that this constituted discrimination on the basis of creed, and that based on prior caselaw, he was entitled to two paid days off per year for religious observances.

After Mr. Markovic filed his complaint, the employer developed a policy for responding to requests to take time off for religious holidays. The policy provided employees with a number of accommodation options such as scheduling adjustments, the use of vacation days, and the use of unpaid leave. The Tribunal's task was to determine whether the policy satisfied Autocom's obligation to accommodate employees celebrating religious holidays on regular work days.

The Commission argued that the policy was unacceptable as prior caselaw stood for the proposition that employers must accommodate religious observances by giving non-Western Christian employees two days of paid leave per year. The Tribunal agreed that employees should not be required to work on holy days, but found that the Commission was incorrect in his interpretation of the prior caselaw. The Tribunal noted that while employers have a duty to accommodate employees' religious observances, the fundamental nature of the employment contract can not be forgotten. In other words, employees must exchange their services for pay, and accommodation must take this into account. The Tribunal relied on the recent Supreme Court of Canada *Hydro-Quebec*² case, which clarified the duties of both employers and employees with respect to accommodation.

The Commission also argued that, in the interests of achieving equality, the complainant was entitled to the day off with pay because Western Christians received the holy days of Good Friday and Christmas Day (December 25th) off with pay. The Tribunal rejected this argument. It pointed out that all Ontarians (Western Christians or otherwise) are entitled to Good Friday and December 25th off, with holiday pay, pursuant to the *Employment Standards Act, 2000*. As such, allowing Mr. Markovic another paid holiday would be inequitable, as he would enjoy more paid holidays than others who only received the paid holidays under the *Employment Standards Act, 2000*.

The Tribunal found that an adjustment to an employee's work schedule is an appropriate accommodation for employees who celebrate religious holidays on regular workdays. For example, employees could make up the time off at a later date, or switch shifts with a colleague. This solution

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¹ 2008 HRTO 64 (CanLII).

² *Supreme Court Clarifies Employers' Duty to Accommodate*
http://www.millerthomson.com/docs/Labour_and_Employment_Communicu233_-_Ontario_July_18_2008.pdf

maintains the integrity of the employment contract, in that the employer is not obliged to pay for a day in which no services are rendered. It also avoids the inequality that would result with respect to other employees who only celebrate religious holidays on statutory public holidays. Accordingly, the Tribunal found that Autocom's policy regarding requests to take time off for religious holidays fulfilled the employer's duty to accommodate.

The Tribunal cautioned, however, that work schedule adjustments will not always constitute reasonable accommodation. If, for example, scheduling changes are not available due to the nature of the workplace, employers may be obliged to consider other forms of accommodation. For example, employees might be permitted to use other paid absences, such as "sick days" for their religious holidays. As such, employers should not regard this case as standing for the proposition that employers are only required to allow a schedule change in order to fulfill the duty to accommodate. As with all instances of accommodation, employers must take an individualized approach that is reasonable in the circumstances.

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